

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

RICHARD GLOSSIP,)
Petitioner,)
v.)
RANDALL WORKMAN, Warden,)
Oklahoma State Penitentiary,)
Respondent.)
Case No. CIV-08-326-HE

MOTION TO EXPAND THE RECORD
AND BRIEF IN SUPPORT

COMES NOW the Respondent, Randall Workman, Warden, Oklahoma State Penitentiary, by and through Seth S. Branham, Assistant Attorney General, and seeks leave to expand the record with the August 24, 2010, affidavit of Connie Smothermon. In support thereof, Respondent shows the following:

1. This Court has authorized supplemental briefing for Petitioner's Ground III from his § 2254 petition. Doc. 57. The State's written response to Petitioner's August 19, 2010, brief is due today, August 24th. Supplemental briefing was authorized upon the expansion of the record with the demonstrative trial aids that are the subject of Ground III. Doc. 55.

2. The Oklahoma Court of Criminal Appeals decided the substantive claim set forth in Ground III on the trial record, without resort to the posters. *Glossip v. State*, 157 P.3d 143, 154-56 (Okla. Crim. App. 2007). Respondent previously urged that Petitioner's

Ground III was unexhausted and procedurally barred and, alternatively, that the record was sufficient to allow for review of the claim. These arguments were ultimately rejected by this Court, thus paving the way for the granting of Petitioner's motion for discovery and expansion of the record with the posters. Doc. 53.

3. Respondent seeks leave to expand the record pursuant to Rule 7, *Rules Governing Habeas Cases*, with the affidavit of Connie Smothermon, the lead prosecutor responsible for generating many of the demonstrative aids at issue in Ground III. Mrs. Smothermon describes the circumstances surrounding the creation and display at trial of the demonstrative aids. Her sworn statement is directly relevant to the allegations set forth in Petitioner's Ground III. Smothermon's affidavit is attached at Exhibit 1 to the supplemental brief filed simultaneously with this motion. Because of the short time frame undersigned counsel had in which to respond to Petitioner's supplemental brief (5 calendar days per this Court's order, Doc. 57), the State is tendering this motion to expand simultaneously with the State's supplemental brief and has utilized Mrs. Smothermon's affidavit in that brief.

4. "Rule 7 of the Rules Governing § 2254 cases gives the district court discretion in determining whether to allow expansion of the record." *McLuckie v. Abbott*, 337 F.3d 1193, 1200 n.3 (10th Cir. 2003). Considering that the Court has now allowed Petitioner to expand the record with the demonstrative aids used at trial, it is appropriate to allow expansion of Mrs. Smothermon's affidavit in order to obtain the full circumstances surrounding these posters. That is especially so considering that the state court adjudicated the merits of this claim on the existing trial record.

All things considered, Respondent's motion to expand the record should be granted.

Respectfully submitted,

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

s/ SETH S. BRANHAM
SETH S. BRANHAM, OBA #18019
ASSISTANT ATTORNEY GENERAL

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921 (Voice)
(405) 522-4534 (Fax)

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

On this 24th day of August, 2010, I certify that a true and correct copy of the foregoing was electronically transmitted to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Mark Henricksen
Lanita Henricksen
e-mail: mark.henricksen@coxinet.net
henricksen.lanita@coxinet.net

s/ SETH S. BRANHAM